(1)

Supreme Court, U.S.
FILED

97 1821 MAY 11 1998

No. _____ OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1997

Richard Anthony Bourie
Petitioner, pro se

In Re Bourie

PETITION FOR WRIT OF HABEAS CORPUS

Richard A. Bourie
4676 Gibraltar St.
Denver, CO 80249
tel: (303) 371-3127

52 pp

QUESTIONS PRESENTED FOR REVIEW

(1) Whether, pursuant to a complaint that a police officer has used excessive force, the Fourth Amendment requires a "responsible determination" of the reasonableness of said police officer's seizure of a citizen.

(2) Whether, absent criminal proceedings, the administrative and non-judicial finding for the public record that a police officer used excessive force during the arrest of a suspect was tantamount to a criminal conviction in violation of the Fifth and Sixth Amendments.

PARTY TO THE PROCEEDINGS

GALE A. NORTON
ATTORNEY GENERAL OF THE STATE OF COLORADO
Respondent

•

Mr. Richard A. Westfall, Solicitor General
Attorney for the Respondent
Counsel of Record

•

Attorney General
State of Colorado
1525 Sherman St., Fifth Floor
Denver, CO 80203
Telephone: (303) 866-5334

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW. i

PARTY TO THE PROCEEDINGS ii

TABLE OF CONTENTS. iii

TABLE OF AUTHORITIES. iv

OPINIONS BELOW. 1

JURISDICTIONAL STATEMENT. 2

CONSTITUTIONAL PROVISIONS. 2

STATEMENT OF THE CASE. 3

REASONS FOR GRANTING THE WRIT. 7

CONCLUSION. 22

APPENDIX

5/16/96 Decision of the Colorado Court of Appeals A-1

6/27/96 Order of the Colorado Court of Appeals (denying rehearing). A-15

1/13/97 Order of the Supreme Court of Colorado (denying certiorari). . . . A-16

8/25/97 United States District Court for the District of Colorado Dismissal Order (for writ of habeas corpus) A-17

9/18/97 United States District Court for the District of Colorado Dismissal Order (for certificate of appealability). .A-21

APPENDIX (Continued)

2/27/98 United States Court of Appeals for the Tenth Circuit's Order and judgement (for certificate of appealability). . A-24

TABLE OF AUTHORITIES

Case — Page

Albright v. Oliver, 114 S.Ct. 807 (1994).. 22

Bourie v. Department of Higher Education, 929 P.2d 19 (Colo.App. 1996). 1

Carafas v. LaValle, 391 U.S. 234 (1968). . .21

Ex Parte Merryman, 17 F.Cas. 144 (1861). . .17

Ex Parte Milligan, 71 U.S. 2 (1866). . . 17,21

Ex Parte Neilsen, 131 U.S. 176(1889) 18

Ex Parte Siebold, 100 U.S. 371 (1841). . . .17

Felker v. Turpin, 117 S.Ct. 450 (1996). . . .2

Fiswick v. U.S., 329 U.S. 211 (1946). . . . 21

Graham v. Connor, 490 U.S. 386 (1989). . . .10

Skaggs v. Larsen, 396 U.S. 1206 (1969). . . .6

Tennessee v. Garner, 471 U.S. 1 (1985). . . .9

OPINIONS BELOW

The Colorado Court of Appeals entered its opinion and order affirming the decision of the Colorado State Personnel Board denying the petitioner a full hearing on May 16, 1996. It is reported as Bourie v. Department of Higher Education, 929 P.2d 19 (Colo. App. 1996). It appears in the appendix at pages A-1 to A-14. Petitioner's request for a rehearing by the court of appeals was denied on June 27, 1996. (Appendix, p. A-15.)

The Colorado Supreme Court entered an order denying the appellant's petition for a Writ of Certiorari on January 13, 1997. (Appendix, p. A-16.)

Petitioner filed a petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. §2241 on July 31, 1997, in the United States District Court for the District of Colorado. The district court issued a dismissal order on August 25, 1997. It appears in the appendix at A-15 to A-18.

Petitioner filed a motion pursuant to 28 U.S.C. §2253(c)(1) to obtain a certificate of appealability on September 10, 1997. This was denied by an order of the district court on

September 18, 1997. It appears in the appendix at A-19 to A-21.

Petitioner filed an appeal in the Tenth Circuit of the United States Court of Appeals on October 10, 1997, pursuant to the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. §§ 2253, 2253(c)(1), and 2254(e). The Court of Appeals issued a dismissal order on February 27, 1998. It appears in the appendix at A-22 to A-23.

JURISDICTIONAL STATEMENT

Jurisdiction of this Court is proper under 28 U.S.C. §§2241 and 2254 (habeas corpus petition filed as an original matter) and 28 U.S.C. §1651 (the All Writs Act). See Felker v. Turpin, 117 S.Ct. 450 (1996).

CONSTITUTIONAL PROVISIONS INVOLVED

Fourth Amendment:

> The right of the people to be secure in their persons... against unreasonable... seizures, shall not be violated...

Fifth Amendment:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. . . nor. . . be compelled... to be a witness against himself, nor be

deprived of... liberty... without due process of law..

Sixth Amendment:
In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed...

STATEMENT OF THE CASE

Petitioner, Richard A. Bourie, is a police officer (peace officer) employed by the University of Colorado Health Sciences Center (Center), an agency of state government. On October 15, 1993, federal police at the nearby Veterans Administration Medical Center (VAMC) in Denver, Colorado, requested that the Center's police assist them in apprehending a fleeing assault suspect. The suspect had left federal property and was last seen on the Center's property.

The Center's police dispatcher activated the alert tone to dispatch officers on an emergency basis and then provided the suspect's description and last known direction of travel. Officers were not advised of the nature of the assault or if a weapon was involved.

As the petitioner approached the assault suspect, the latter was behaving bizarrely and

then turned and made a furtive gesture that appeared as if he were reaching into his waistband for a weapon. The petitioner, concerned for his safety, drew his pistol, pointed it at the suspect, and announced "police officer!" The suspect then surrendered and was taken into custody without incident. A frisk revealed no weapons. The assault victim identified the suspect at the scene of the stop and Center police officers then transported the suspect to the VAMC police station.

Following this arrest, one of the petitioner's fellow officers reported to the Center's chief of police that the petitioner had used excessive force in the arrest of the assault suspect. On November 2, 1993, the Center's chief of police requested that the Center's assistant vice chancellor for business affairs (vice chancellor) conduct an investigation and administrative review of this arrest. On November 6, 1993, petitioner was placed on administrative leave with pay. On November 12, 1993, the vice chancellor convened a pre-disciplinary hearing and met with the petitioner. Following the hearing, petitioner was returned to full duty and issued a corrective action for using excessive force in

the arrest of the assault suspect. The vice chancellor, although an agent of the Center's chief of police, did not provide his investigative findings of excessive force to the Denver District Attorney's Office, nor did he file a criminal complaint against the petitioner on behalf of the Center.

The corrective action did not affect petitioner's pay or status, but did establish his use of excessive force in the arrest of an assault suspect and informed him to

> improve his work in three areas: (1) judgment in the use of force; (2) attentiveness to police procedures; and (3) communicating with supervisors. (Appendix at A-3.)

The corrective action is a permanent part of the petitioner's personnel file, and is a public record of the agency's actions with regard to his alleged misconduct.

The petitioner grieved this corrective action at the Center, asserting inter alia, that the vice chancellor had exceeded his authority by proceeding against him non-judicially in violation of his due process rights. The Center's chancellor ultimately upheld the vice chancellor's decision. The

petitioner then appealed to the State Personnel Board (Board) for a full hearing which was denied by an administrative law judge (ALJ). The Board upheld the ALJ's recommendation that a full hearing not be granted. On appeal, the Colorado Court of Appeals affirmed the order of the Board. The Supreme Court of Colorado denied certiorari.

Petitioner then filed a petition for a Writ of Habeas Corpus by one attacking a state detainer. The U.S. District Court for the District of Colorado denied this petition holding that it could not review a civil matter. (Appendix at A-18.)

Petitioner next filed a motion with the district court to obtain a certificate of appealability, citing Skaggs v. Larsen, 396 U.S. 1206, 1208 (1969), as the controlling case in the instant petition, to wit:

> The Great Writ was designed to protect every person from being detained, restrained, or confined by any branch or agency of government.

The petitioner further noted that the Skaggs Court also held that while a military order extending an enlistment contract was "not in form penal" the issue presented was

"substantial and should be resolved."

The district court again denied the petitioner's request holding that he had not made a "substantial showing of the denial of the constitutional right." (Appendix at A-20.)

On appeal to the United States Court of Appeals for the Tenth Circuit, the Tenth Circuit upheld the order of the district court "for substantially the reasons stated in the district court's order dated August 26, 1997," and dismissed the petition. (Appendix at A-23.)

REASONS FOR GRANTING HABEAS CORPUS

Ought the writ to issue? The petitioner believes in the affirmative because:

> (1) The writ will be in aid of the Court's appellate jurisdiction with respect to defining what constitutes a "responsible determination" of Fourth Amendment violations involving unreasonable force.
>
> (2) The exceptional circumstances of his case, to wit: the state's administrative and non-judicial finding of his criminal guilt for the felony offense of using excessive force. This finding is tantamount to a criminal conviction and was made in violation of due process.

I.

Colorado requires, under the penalty of law, that peace officers invoke the protections of the Fourth Amendment on behalf of citizens when they observe what they believe is unreasonable force used during the course of an arrest, investigatory stop, or other seizure of a free citizen. In compliance with C.R.S. § 18-8-802, peace officers who

> witness another peace officer... taking any person into custody... use physical force which exceeds the degree of physical force permitted pursuant to section 18-1-701 must report such use of force to such officer's immediate supervisor.

It is peace officers themselves who initially determine the reasonableness of any seizures of citizens by fellow officers, because they interpret what constitutes excessive force in terms of C.R.S. § 18-8-803(2):

> The use of excessive force shall be presumed when a peace officer continues to apply physical force in excess of the force permitted by section 18-1-707 to a person who has been rendered incapable of resisting arrest.

Thereafter however, the Fourth Amendment protections against physically intrusive

governmental conduct requires the resolution of all allegations regarding the use of excessive force consistent with its "reasonableness standard" (or the reasonable officer criteria).

This test of reasonableness under the Fourth Amendment

> requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. Tennessee v. Garner, 471 U.S. 1, 8-9, 105 S.Ct. 1694, 85 L.Ed. 2d 1 (1985). (Emphasis added.)

Accordingly, whenever questions arise about the type and degree of force used to seize a person in the performance of law enforcement duties, a scrupulous analysis of the facts and circumstances of each particular case must be conducted to properly balance the officer's conduct with the protections afforded a citizen by the Fourth Amendment.

This conforms with the Court's holding that

> when minimal police interference becomes a seizure, there can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment.

Tennessee v. Garner, 471 U.S. 1.

Four years later, the Court reiterated this requirement, explicitly holding that

> all claims that law enforcement officers have used excessive force -deadly or not- in the course of an arrest, investigatory stop, or other "seizure" of a free citizen should be analyzed under the Fourth Amendment and its "reasonableness standard," rather than under a "substantive due process" approach. Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of "substantive due process," must be the guide for analyzing these claims. Graham v. Connor, 490 U.S. 386, 396 (1989).

The petitioner believes that the Court's landmark holdings supra, elucidate a Fourth Amendment requirement for the "responsible determination" of the reasonableness of any police officer's seizure of a citizen pursuant to an allegation of the use of excessive force. The petitioner further contends that ensuring compliance with the Fourth Amendment's "reasonableness standard" requires judicial or prosecutorial oversight of any public entity's review of an excessive force allegation, whether the complaint issues from officers or

citizens.

To assure uniformity in its application, the petitioner further contends that the Fourth Amendment minimally requires that public entities employing peace officers make all responsible determinations in conjunction with a district attorney, a judge, or a Grand Jury, especially when there is "conflicting evidence" in any particular case. (Appendix at A-11.) If probable cause pertaining to an assault under the color of law is established, the ultimate resolution of any alleged use of excessive force is with the jury at a criminal trial.

The Roman poet Juvenal's ancient question "...quis custodiet ipsos Custodes?" ("Who will guard the Guardians?" Juvenal VI, 347.), is not moot with regard to the Fourth Amendment. Absent a responsible determination requirement, public entities employing peace officers are empowered to exclusively resolve all complaints pertaining to the use of excessive force by their police officers. As such, citizens are afforded no meaningful Fourth Amendment protections. Without the scrutiny of a district attorney, a judge, or a Grand Jury, application of the "reasonableness standard" of review will be sui generis as each police or public

administrator sees fit. In addition, absent a responsible determination whose standard of care is comparable to that of a preliminary hearing, suspected police officers will be divested of their Constitutional rights under the Fifth and Sixth Amendments.

II.

The distinguishing feature of a criminal act is its injury to society and the requirement that criminal proceedings be utilized to resolve the issue of guilt.

A.

Colorado Revised Statutes (C.R.S.) make the use of excessive force by a peace officer a crime which cannot be tried by entities of limited jurisdiction as either a civil or administrative violation. Unequivocally, the statute requires that a police officer's alleged use of excessive force must first be resolved as an offense against the people before it may be found an affront to the employer.

Colorado Revised Statutes pertaining to the use of excessive force, Colorado Criminal Code, Title 18, section 8, "Offenses Relating to the Use of Force by Peace Officers," are construed together and harmonized in pari materia with those of Colorado Criminal Code Title 18, Article 3, Part 1, "Homicide and Related Offenses" and Part 2, "Assaults." The plain language of this statute and the legislature's expressed preference for criminal categorization is apparent to anyone.

Lest there be any doubt regarding the necessity to proceed criminally against an offending officer, C.R.S. section 18-8-803(1) states unquestionably that

> a peace officer who uses excessive force in pursuance of such officer's law enforcement duties shall be subject to the criminal laws of this state to the same degree as any other citizen. . . (Emphasis added.)

The imperative "shall" means there is no alternative to criminal proceedings and neither is there dual jurisdiction between a public entity employing peace officers and the criminal courts.

The incorporation of these statutes into the criminal code further means that the

punishment for a violation of this statute is reserved to the people, not the vice chancellor of a state agency. The statute's punishment ranges from imprisonment and fines to death; nowhere does it include a non-judicially imposed "corrective action." Therefore, the Center's act of admonishing the petitioner to improve his workplace performance usurped the people's expressed desire to punish this offense as a serious crime.

B.

The legislative design of C.R.S. section 18-8-803(1) implicitly precludes civil or administrative proceedings to ascertain criminal guilt. Indeed, the legislature only granted entities employing peace officers the authority to

> adopt policies or guidelines concerning the use of force which shall be complied with by peace officers in carrying out the duties of such peace officers within the jurisdiction of the public entity. C.R.S. §18-8-804 (1995 Cum. Supp.)

Entities employing peace officers must prohibit unreasonable seizures in violation of the Fourth Amendment, making the Center's prohibition against the use of excessive force and the forbidden conduct of the statute

equally criminal. However, the statutory authority to proscribe criminal behavior in the workplace did not confer permission to prosecute in lieu of criminal proceedings.

Contrary to the statute's implicit requirement for a responsible determination of reasonableness, the vice chancellor did not refer his investigative findings to the district attorney, a judge, or a Grand Jury. He further failed to file a criminal complaint through the Center's police department. By virtue of these omissions, the vice chancellor expropriated judicial authority by which he impermissibly and unilaterally established for the public record that the petitioner had committed the criminal offense in question. Additionally, in failing to submit his findings for judicial review, the vice chancellor acted with complete disregard and deliberate indifference to the arrested suspect's Fourth Amendment rights which he determined were violated by the petitioner.

The vice chancellor's verdict consigned the petitioner to basically the same position as a citizen alleged to have committed a felony assault. Ergo, resolving the issue of his alleged criminal guilt required criminal

proceedings consistent with the Fifth and Sixth Amendments' protections for persons accused of a capital or infamous crime. At a minimum then, the Due Process Clause entitled the petitioner to a responsible determination of probable cause, if any.

Under C.R.S. § 18-8-115, "Duty to report a crime," the vice chancellor had an affirmative obligation to file a criminal complaint or refer his investigative findings to the Denver District Attorney's Office:

> It is the duty of every corporation or person who has reasonable grounds to believe that a crime has been committed to report it promptly to law enforcement authorities...

As an agent of the Center's chief of police the vice chancellor's omission begs the question: If he was reasonably certain of the petitioner's criminal culpability, why was the petitioner not delivered to the Denver District Attorney - the jurisdiction's chief law enforcement officer - or the Denver District Court to be proceeded against according to law? Certainly

> No reason of necessity could be urged against it; because Congress had declared penalties against the offenses charged, provided for their punishment, and

> directed that a court hear and determine them. Ex Parte Milligan, 71 U.S. 2 (1866).

This inexplicable act of omission was analogous to that of the military authority "who had reason to believe that the prisoner [Merryman] had committed an offense against the United States" but

> failed to do his duty to give information of the fact and the evidence to support it, to the district attorney... Ex Parte Merryman, 17 F.Cas. 144 (Taney, Circuit Justice, 1861) (No. 9487).

C.

Virtually all tribunals have seen the injustice of allowing the state to deprive citizens of their liberty when constitutional or statutory rights are denied them during the course of prosecution or when the trial court lacks jurisdiction under the governing law. Indeed, this Court held long ago that

> habeas corpus is everywhere available to free persons brought before a court to hear criminal charges where the court lacks jurisdiction, either over the offense or the jurisdiction. Ex Parte Siebold, 100 U.S. 371, 25 L.Ed. 717 (1841).

Again in 1889, the Court reaffirmed its

precedent:

> It is firmly established that if the court which renders the judgment has not jurisdiction to render it, either because its proceedings, or the law under which they are taken, are unconstitutional, or for any other reason, the judgment is void and may be questioned collaterally, and a defendant who is imprisoned under and by virtue of it may be discharged from custody on habeas corpus. Ex parte Neilsen, 131 U.S. 176, 182; 33 L.Ed 118 (1889).

Simply put, the gravamen of this argument is that the vice chancellor and the Center lacked any jurisdiction whatsoever to try or otherwise proceed non-judicially against the petitioner for the felony criminal offense of using excessive force. The vice chancellor's determination that the petitioner committed the criminal offense of using excessive force (with the included offense of felony menacing, C.R.S. §18-3-206) was ultra vires, and a violation of constitutionally protected due process.

III.

The notion of a "conviction" is equivocal; its use and meaning may vary with the situation. In terms of this statute therefore, establishing for the public record that the petitioner violated the prohibition

against the use of excessive force is to equally assert his criminal guilt. In this regard then, the vice chancellor's corrective action is indistinguishable from a conviction and is particularly adverse to the petitioner.

The collateral consequences to a peace officer who stands accused or convicted of using excessive force are several and severe. To name a few: prosecution under federal criminal statute 18 U.S.C. 242; prosecution under federal civil rights statute 42 U.S.C. 1983; loss of peace officer certification and law enforcement employment for life; a public record of assault under the color of law to be used in any future criminal or civil proceedings in state court; a public record of assault under the color of law to be used adversely in an employment setting; a public record of assault under color of law to stigmatize one seeking public office; and so forth. Clearly then, the liberty restraints to one accused or convicted of this offense are significant, and cannot be overstated.

In this light, the Colorado Court of Appeals' holding egregiously compounds the vice chancellor's errors, sanctions the deprivation of due process rights and creates a forbidden

suspect class impermissibly based on occupation. In addition, the court allowed impermissible selectivity in the enforcement of the criminal law by granting sole discretion to public entities employing peace officers to convene either administrative or civil proceedings in lieu of criminal proceedings for this crime, in violation of the Equal Protection Clause of the Constitution.

Lamentably, the district court denied habeas because the petitioner was

> not charged or convicted of a criminal offense in connection with the incident upon which the state personnel action was based. (Appendix at A-18.)

This unfortunate constraint of habeas corpus exacerbates the restraint of liberty the petitioner has suffered. It leaves unresolved something far more pernicious than being charged with a criminal offense; namely a public record tantamount to the conviction of a crime. It is a public record created without due process of law that for the petitioner

> stands as ominous proof that he did what was charged and puts beyond his reach any showing of ameliorating circumstances or explanatory matter that might remove part or all of the curse... The conviction he suffered was not in accordance with law... and he must stand in the position of any

> man who has been accused of a crime but not yet shown to have committed it. To dismiss his case as moot would permit the government to compound its error at... [his] expense. That course does not comport with our standards of law enforcement. Carafas v. LaValle, 391 U.S. 234(1968) at 237, citing Fiswick v. U.S., 329 U.S. 211, 222 (1946).

IV.

It merits reiteration that from November, 1993, through today, the petitioner has never asked for an absolute discharge from responsibility for his actions in the arrest of the assault suspect. Rather, like Mr. Lambdin P. Milligan, 132 years ago, he has only appealed for deliverance from an improper agency decision to legitimate authority, and if

> found probably guilty of any offense, to be turned over to the proper tribunal for inquiry and punishment; or if not found probably guilty, to be discharged. Ex Parte Milligan at 135*.

If the Center had provided the petitioner with his minimal criminal procedural protections, he would have been able to prove his actual innocence and this petition would be moot. Further, were it not for the deprivation of his Constitutional rights, no reasonable fact-finder would have adjudged him guilty.

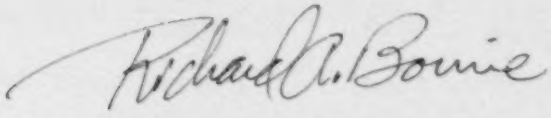
This notwithstanding, there remains a live federal constitutional controversy which the petitioner has labored for years to resolve, and for which adequate relief cannot be obtained in any other form or from any other court. Indeed, the petitioner believes that only the Court's exercise of its discretionary powers in granting the instant petition will ensure that the

> the Bill of Rights... [through which] the Framers sought to restrict the exercise of arbitrary authority by the Government in particular situations... [remains the] explicit textual source of constitutional protections against a particular sort of government behavior... Albright v. Oliver, 114 S.Ct. 807, 813 (1994).

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that his Petition for Writ of Habeas Corpus be granted.

Respectfully submitted,



Richard A. Bourie,
Petitioner, pro se.

COLORADO COURT OF APPEALS
May 16, 1996
95CA0464

Richard A. Bourie, Complainant,

Appellant,

v.

Department of Higher Education, and University of Colorado Health Sciences Center, Department of Police,

Respondents-Appellees,

and

State Personnel Board,

Appellee.

Appeal from the Colorado State Personnel Board
No. 94-G-41
ORDER AFFIRMED

Division III
Opinion by JUDGE ROY
Plank and Ney, JJ., concur

F. Anthony Van Deusen, Denver, Colorado, for Appellant

Gale A. Norton, Attorney General, Stephen K. Erkenbrack, Chief Deputy Attorney General, Timothy M. Tynkovich, Solicitor General, Daniel J. Wilkerson, Special Assistant Attorney General, Denver, Colorado, for Respondents-Appellees

Gale A. Norton, Attorney General, Stephen K. Erkenbrack, Chief Deputy Attorney General, Timothy M. Tynkovich, Solicitor General, G. Charles Robertson, Assistant Attorney General, Denver, Colorado, for Appelee

Complainant, Richard A. Bourie, appeals the order of the State Personnel Board (Board) affirming the preliminary finding of an Administrative Law Judge (ALJ) that respondents, the Department of Higher Education and the University of Colorado Health Sciences Center, properly took corrective action against complainant. We affirm.

Complainant is a police officer employed by the Center. On October 15, 1993, he drew his weapon during the arrest of a person suspected of committing an assault. Complainant did not request assistance prior to or during the arrest, and he questioned the suspect without advising him of his Miranda rights. In addition, complainant did not report to his supervisor that he had drawn his weapon during the arrest, as required by department policy.

A fellow officer who also responded to the scene of the arrest later reported the incident to the chief of police at the Center, and on November 2, 1993, the chief of police asked the assistant vice chancellor for business affairs to investigate the matter. On November 6, 1993, complainant was placed on administrative

leave with pay and prohibited from entering the Center except for medical reasons.

The assistant vice chancellor reviewed reports and statements concerning the incident, interviewed complainant's fellow officers, and on November 9, 1993, notified complainant the he would conduct a pre-disciplinary meeting with complainant in accordance with Department of Personnel Rule No. R8-3-3, 4 Code Colo. Reg. 801-1.

The pre-disciplinary meeting was held November 12, 1993, following which the assistant vice chancellor concluded that complainant's actions did not warrant disciplinary action, but did warrant a "corrective action." Complainant was informed that he needed to "improved his work in three areas: (1) judgement in the use of force; (2) attentiveness to police procedures; and (3) communicating with supervisors."

From November 22, 1993, to April 29, 1994, complainant pursued the matter through the Center's multi-level grievance process. At the conclusion of that process, the chancellor of the Center sustained the corrective action, but directed that any record of the action be

removed from complainant's file on November 17, 1995, if in the interim, no disciplinary action predicated on the excessive use of force was imposed.

On May 4, 1994, complainant appealed the chancellor's decision to the Board. An ALJ recommended that the Board uphold that action of the Center and not conduct a full hearing on complainant's appeal with respect thereto. The Board adopted the ALJ's recommendation on February 21, 1995. This appeal follows.

I.

Complainant first argues that the use of excessive force by a police officer is a crime and that, therefore, respondents cannot take any administrative action against him on an allegation of the use of excessive force. He asserts that the only permissible course of action is the commencement of criminal proceedings, in which he would be entitled to all of the procedural protections there applicable. We do not agree.

A.

Complainant first contends, essentially, that for public entities that employ peace

officers, the prosecution of criminal charges pursuant to §18-8-801, et seq., C.R.S. (1995 Cum. Supp.) is the sole remedy and procedure available to address allegations that an officer has used excessive force. We do not agree with complainant's contention.

Section 18-8-802, C.R.S. (1995 Cum. Supp.), as relevant to this appeal, requires a peace officer who witness another officer's use of excessive force to report the incident to their superiors. Section 18-8-803(1), C.R.S. (1995 Cum. Supp.) goes on to provide, in pertinent part:

> Subject to the provisions of section 18-1-707, [special rules on use of force in making an arrest] a peace officer who uses excessive force in pursuance of such officer's law enforcement duties shall be subject to the criminal laws of this state to the same degree as any other citizen, including the provisions of part 1 of article 3 of this title concerning homicide and related offenses and the provisions of part 2 of said article 3 concerning assaults.

Section 18-8-804, C.R.S. (1995 Cum. Supp.) provides:

> Each public entity which employs any peace officer shall adopt policies or guidelines concerning the use of force by peace officers which shall be complied with by peace officers in carrying out the duties of such officers within the jurisdiction of the public entity.

Complainant's argument is that these statutes create an "affirmative obligation" for public entities "to file or cause to be filed" criminal charges against officers who use excessive force. Such argument is, in our view, contrary to the plain meaning of the statutes. See Moody v. Corsentino, 843 P.2d 1355 (Colo. 1993).

In our view, the plain language of these statutes establishes a public policy that law enforcement officers have no immunity from criminal prosecution nor are they accorded any special status with respect to the use of force except in making an arrest. There is no indication in these statutes that a public entity is required to file a criminal complaint against a peace officer for the use of excessive force, nor need such an entity forego administrative action until any criminal

proceeding is completed.

B.

Complainant further contends that because respondents essentially charged him with a crime, he was entitled to the procedural protections defendants obtain in a criminal proceeding. We disagree.

In Jones v. Civil Service Commission, 176 Colo. 25, 489 P.2d 320 (1971), our supreme court held that a state employee who was fired for committing what amounted to a criminal offense was not entitled to the procedural protections of a criminal proceeding during an administrative process to determine whether he should be dismissed. The court noted that the employee was not charged with a criminal offense and that any statements he made were not used against him in a criminal proceeding.

We conclude that Jones controls and, therefore, hold that the complainant was not entitled to criminal procedural protections. As in Jones, complainant was not charged with an offense, nor were any statements he made used against him in a later criminal proceeding. The proceedings that led to the

corrective action against complainant were administrative in nature and were not analogous to a criminal prosecution. See Jones v. Civil Service Commission, supra.

II.

Complainant next contends that respondents denied him due process during the administrative process. We perceive no error.

A.

In this regard, complainant first argues that the assistant vice chancellor did not properly inform him of the disciplinary charges against him nor provide complainant with any information for him to refute at the pre-disciplinary meeting. We do not agree.

Procedural due process requires notice and an opportunity to be heard. People in Interest of D.G., 733 P.2d 1199 (Colo. 1987). These principles apply to administrative proceedings. Electric Power Research Institute, Inc. v. City & County of Denver, 737 P.2d 822 (Colo. 1987). However, the notice requirement in an administrative proceeding does not require the same formality, specificity, and detail that is required in a criminal proceeding.

See generally Chiappe v. State Personnel

Board, 622 P.2d 527, 532 (Colo. 1981) ("Due process calls for the procedural protections which the particular situation demands.").

Department of Personnel Rule 8-3-3(D), 4 Code Colo. Reg. 801-1, requires an appointing authority to meet with an employee facing disciplinary action, to present the information to the employee, and to give the employee an opportunity to admit or refute the information. Due process requires that respondents comply with these standards. See Department of Health v. Donahue, 690 P.2d 243 (Colo. 1984); Shaball v. State Compensation Insurance Authority, 799 P.2d 399 (Colo. App. 1990).

Here, the ALJ held, with record support, that complainant was given sufficient notice and a meaningful opportunity to refute the charges. The assistant vice chancellor's letter advising the complainant of the initial meeting stated:

> At the meeting, we will be discussing your alleged failure to comply with standards of efficient [sic] service or competence. Specifically, we will discuss: the incident on October 15, 1993, which resulted in the arrest of [the suspect]; whether or not you

> exercised proper judgement in the incident; and whether or not you followed proper police and departmental procedures.

The notice was, in our view, sufficient to provide the complainant with notice of the purpose of, and the matters to be addressed at, the meeting.

Neither the regulation nor fundamental due process requires that the appointing authority provide an employee with the reports, statements of witnesses, or other evidence relating to the matter prior to the initial meeting. The regulation provides, instead, that the employee be permitted to refute the charges against him at the meeting. Shumate v. State Personnel Board, 34 Colo. App. 393, 528 P.2d 404 (1974). Here, the record shows that complainant was given an opportunity to refute the charges against him, and therefore, he was provided with sufficient procedural due process with respect to the initial meeting.

B.

Complainant next argues that the assistant vice chancellor deprived him of his substantive

due process rights because there was insufficient evidence to support the corrective action. We disagree.

Here, although there was conflicting evidence, there was sufficient evidence in the record for the ALJ and the Board to conclude that the assistant vice chancellor acted appropriately in issuing a corrective action. See Charnes v. Lobato, 743 P.2d 27 (Colo. 1987). Therefore, there was no deprivation of complainant's due process rights.

III.

Last, complainant argues that the Board erred in not granting him an evidentiary hearing. Again, we perceive no error.

The Board's interpretation of its own rules is generally entitled to great weight unless it is plainly erroneous or inconsistent with such rule or the underlying statute. An action of the Board will be upheld if there is sufficient evidence in the record to support it. Bishop v. Department of Institutions, 831 P.2d 506 (Colo. App. 1992).

Section 24-50-123, C.R.S. (1988 Repl. Vol.

10B), which deals with grievance proceedings, provides:

> The board shall, by rule, adopt a uniform grievance procedure to be used by all principal departments and agencies in the state personnel system. The grievance procedure shall provide an orderly system of review for all grievances, except those arising under section 24-50-125. The decision of the appointing authority shall be final; except that the board may review the decision of the appointing authority and, upon such review, shall uphold the decision unless the board finds that the decision was made arbitrarily or capriciously. (Emphasis added.)

Section 24-50-125, C.R.S. (1988 Repl. Vol. 10B), which deals with discipline, provides that the Board shall hold a hearing within 45 days of the appeal upon request of the employee when the employee has been dismissed, suspended, or otherwise disciplined by the appointing authority.

Section 24-50-123 permits hearings before the Board on appeals of employee grievances, while §24-50-125 provides for mandatory hearings upon the request of the employee when discipline is involved.

Department of Personnel rules provide that an employee may appeal any decision of the appointing authority to the Board. Department of Personnel Rule No. R10-2-3, 4 Code of Colo. Reg 901-1. The rules further provide that "a preliminary review is used as a screening device. . . to determine whether or not valid issues exist which merit a full hearing." Department of Personnel Rule No. R-10-4-2, 4 Code Colo. Reg. 801-1.

Thus, while Department of Personnel rules allow for an appeal of both grievances and disciplinary actions to the Board, the statutes give the Board discretion as to whether to hold hearings on appeals of grievances involving non-disciplinary actions.

Here, no disciplinary action was taken. Therefore, no hearing was required. The ALJ made preliminary findings and recommended that the Board uphold the corrective action imposed by the appointing authority and further recommend that no evidentiary hearing was necessary. Both the ALJ and the Board followed the applicable rules and regulations.

In our view, there was no abuse of discretion in either upholding the corrective

action of the appointing authority or in denying the hearing.

Accordingly, the order is affirmed.

JUDGE PLANK and JUDGE NEY concur.

THE COURT OF APPEALS OF THE STATE OF COLORADO

Case Number 95CA0464

ORDER

RICHARD A. BOURIE ET AL V DEPT., OF HIGHER EDUCATION ET AL

Upon consideration of the Petiton for Rehearing filed by the Appellant herein, the Petition is hereby DENIED. It is ordered that issuance of the Mandate is stayed to and including July 29, 1996, provided that if a Petition for Writ of Certiorari is timely filed with the Supreme Court of the State of Colorado, the stay shall remain in effect until disposition of the cause by the Supreme Court.

BY THE COURT

Roy, J.

Plank, J.

Ney, J.

DATED: June 27, 1996

SUPREME COURT, STATE OF COLORADO
CASE NO. 96SC499
CERTIORARI TO THE COLORADO COURT OF APPEALS, 95CA0464
STATE PERSONNEL BOARD, 94G41

ORDER OF COURT

RICHARD A. BOURIE,

Petitioner,

v.

DEPARTMENT OF HIGHER EDUCATION, UNIVERSITY OF COLORADO HEALTH SCIENCES CENTER, DEPARTMENT OF POLICE; and THE STATE PERSONELL BOARD, STATE OF
COLORADO,

Respondents.

Upon consideration of the Petition for Writ of Certiorari to the
Colorado Court of Appealsss, and after review of the record, the briefs, and the judgement of said Court of Appeals,

IT IS THIS DAY ORDERED that said petition for Writ of Certiorari shal be, and same hereby is, DENIED.

BY THE COURT, EN BANC, JANUARY 13, 1997.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Lewis T. Babcock, Judge

Civil Action 97-B-1625

RICHARD ANTHONY BOURIE,
Petitioner,

v.

GALE A. NORTON, Attorney General of Colorado,
Respondent.

Order

Petitioner, Richard Anthony Bourie (Bourie), filed an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 for relief from a civil, state personnel "corrective action" he received while employed by the University of Colorado Health Sciences Center (Center). On July 31, 1997, I issued an order to show cause to respondent, Gale A. Norton, Attorney General of Colorado, why the petition for writ of habeas corpus should not be granted. Based on respondent's response to the order to show cause, I will dismiss the

petition for writ of habeas corpus.

Bourie is a police officer employed by the Center. On October 15, 1993, Bourie drew his weapon during the arrest of a person suspected of committing an assault. He did not request assistance before or during the arrest, and he questioned the suspect without advising him of his Miranda rights. Also, he did not report to his supervisor that he had drawn his weapon during the arrest, as required by department personnel. *Bourie v. Department of Higher Education*, 929 P.2d 18, 20 (Colo.App. 1996), cert. denied, January 13, 1997. A fellow officer reported the incident to the chief of police at the Center. After an investigation of the incident, the assistant vice chancellor issued a "corrective action" which was place in Bourie's file. From November, 1993 to April, 1994, Bourie pursued the matter through the Center's multilevel grievance process. At the conclusion of the process, the chancellor of the Center sustained the corrective action, but directed that any record of the action be removed from complainant's file on November 17, 1995, if, in the meantime, no further disciplinary action was imposed for excessive

use of force. Bourie appealed the chancellor's decision to the State Personnel Board (Board). An administrative law judge recommended that the Board uphold the action of the Center. The Board adopted the ALJ's recommendation on February 21, 1995.

II.

A writ of habeas corpus is not casually available. *Lefkowitz v. Fair*, 816 F.2d 17 (1st Cir. 1987). As the United States Supreme Court has said, the writ of habeas corpus is a "remedy for severe restraints on individual liberty." *Hensley v. Municipal Court*, 422 U.S. 345, 351 (1973). Traditionally, the federal courts consider exercising their power of the writ of habeas corpus on behalf of one who is "in custody pursuant to the judgement of a State court," 28 U.S.C. § 2254, as a result of state criminal proceedings. *Lefkowitz*, 816 F.2d at 19. Over the years, the meaning of "custody" has been broadened by the court so that it is no longer limited to physical custody. *See Justices of the Boston Municipal Court v. Lydon*, 466 U.S. 294, 301

(1984)(release on personal recognizance pending execution of sentence constitutes custody); *Hensley v. Municipal Court*, 411 U.S. 345, 349-51 (1973)(release on personal recognizance pending execution of sentence constitutes custody); *Jones v. Cunningham*, 371, U.S. 236 (1963)(parole tantamount to custody). However, the requirement remains unchanged that the petitioner be in custody pursuant to a criminal convicition.

It is undisputed that Bourie was never charged or convicted of a criminal offense in connection with the incident upon which the state personnel corrective action was based. Thus, I have no jurisdiction to hear a petition for a writ of habeas corpus based solely on a civil state personnel proceeding. Accordingly, IT IS ORDERED that Bourie's petition be DISMISSED.

Dated: August 25, 1997 in Denver, Colorado.

BY THE COURT:

/s/
LEWIS T. BABCOCK, JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Lewis T. Babcock, Judge

Civil Action 97-B-1625

RICHARD ANTHONY BOURIE,
Petitioner,

v.

GALE A. NORTON, Attorney General of Colorado,
Respondent.

Order

This matter comes before the court on the petitioner's Motion, filed as a Notice of Appeal on September 10, 1997.

On April 24, 1996, President Clinton signed into law the Antiterrorism and Effective Death Penalty Act, Pub.L.No. 104-132, 110 Stat. 1214, which contains, among significant amendments to 28 U.S.C. § 2244, § 2254, § 2255, and 21 U.S.C. § 848(q), some important amendments to 28 U.S.C. § 2253 and Appellate Rule 22, which govern appeal of final district court orders in habeas corpus and § 2255 proceedings. The court must consider this

petition" pursuant to 28 U.S.C. § 2253 and Fed.R.App.P. 22, as both are amended by the Antiterrorism and Effective Death Penalty Act, Pub.L.No. 104-132, 110 Stat. 1214.

The Antiterrorism and Effective Death Penalty Act amends 28 U.S.C. § 2253 to provide that an appeal may not be taken to the court of appeals from a district judge's ruling on a state prisoner's habeas corpus petition unless a "circuit justice or judge" issues a "certificate of appealability." 28 U.S.C. § 2253(c)(1). A conforming amendment to Fed.R.App.P. 22, however, specifies "a district judge or a circuit judge." The certificate of appealability may be issued only if the prisoner has made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253 (c)(2). This court's review of the petitioner's notice of appeal reveals that the petitioner has not made a substantial showing of the denial of the constitutional right.

The court now being sufficiently advised. IT IS ORDERED that a certificate of appealability should not issue.

Dated: September 18, 1997.

BY THE COURT:
/s/
Lewis T. Babcock, Judge

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

RICHARD ANTHONY BOURIE,	)	
Petitioner - Appellant,	)	
v.	)	No. 97-1343 (D. Colorado) (D.C.No.97-B-1625)
ATTORNEY GENERAL OF THE STATE OF COLORADO,	)	
Respondent - Appellee.	)	

ORDER AND JUDGEMENT*

Before ANDERSON, McKAY, and LUCERO, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. See Fed.R.App.P. 34(a); 10th Cir.R.34.1.9. The case

* This order and judgement is not binding precedent, except under the doctrines of law of the cases, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgements; nevertheless, an order and judgement may be cited under the terms and conditions of 10th Cir.R.36.3.

is therefore ordered submitted without oral argument.

Appellant Richard Anthony Bourie, proceeding *pro se*, appeals the dismissal of his 28 U.S.C. 2254 habeas action, in which he sought relief from a civil, state personnel "corrective action" he received based on his use of excessive force in the course of an arrest he made while employed as a police officer by the University of Colorado Health Sciences Center. The district court held it lacked jurisdiction to hear a habeas petition based solely on a civil state personnel proceeding, and dismissed Mr. Bourie's petition.

We deny Mr. Bourie's request for a certificate of appealability and dismiss his petition for substantially the reasons stated in the district court's order dated August 26. 1997.

ENTERED FOR THE COURT

Stephen H. Anderson
Circuit Judge

[Dated: February 27, 1998.]